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"VOLUNTARY" ADMISSION OF CHILDREN TO MENTAL HOSPITALS: A CONFLICT OF INTEREST BETWEEN PARENT AND CHILD

> [H]ospitalization in a mental institution is a serious and possibly injurious event in the life of an individual, particularly a child or adolescent. Institutionalized individuals are cut off from significant interpersonal relationships with family and friends, and from their usual life activities. Institutionalization creates a major discontinuity in a person's life. It also places him or her within an artificial, regimented and restrictive environment that can seriously harm those not in need of such placement.[1]

Despite the gravity of the harm and the deprivation of liberty involved in institutionalization, most states today allow parents to place their child in a mental institution, with only the approval of a hospital administrator or psychiatrist required.[2] The child is afforded no procedural protections and, therefore, has no adequate opportunity to voice any objec-

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1. Affidavit of Dr. Eli Charles Messinger at 3, filed with Memorandum in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Motion to Dismiss or in the Alternative for Summary Judgment, Poe v. Weinberger, Civil No. 74–1800 (three-judge court) (D.D.C., filed Aug. 28, 1975). Dr. Messinger is the chief of the Child and Adolescent Out-Patient Department at Metropolitan Hospital, a large municipal hospital in New York City. He has qualified as an expert for the purpose of providing opinion evidence on the placement of juveniles in mental institutions.

2. Maryland's statute permitting parents and guardians of minors to voluntarily commit them to mental institutions is typical of those found in other states. Regarding admissions to an institution for the mentally ill, MD. ANN. CODE art. 59, § 11(g) (1972) provides:

> (g) Persons under 18 years of age. — Any facility licensed by or under the jurisdiction of the Department may admit for the purposes of care or treatment, or both, any person under the age of 18 years who has any mental disorder which is susceptible of care or treatment and whose admission to such facility has been requested by at least one parent or his legal guardian. The person requesting such admission must, as a prerequisite to the admission, be able to understand the nature of the request. The admission request must be formal, written and assented to by an admitting physician at the facility. No person admitted pursuant to this subsection may be retained for more than three days, after the person who requested his admission requests his release, unless his admission status is changed pursuant to § 12 of this subtitle. No person admitted pursuant to this subsection may be retained by a facility for any period in excess of one year unless his admission status has been changed after initial admission or unless at the expiration of each one year period of inpatient residence a new request is executed by a parent or the legal guardian of the patient.

MD. ANN. CODE art. 59A, § 9 (Supp. 1975) covers admissions to an institution for the mentally retarded.

For a listing of the other state statutes permitting parents to voluntarily commit their children to mental institutions, see Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CALIF. L. REV. 840 (1974) [hereinafter cited as Ellis].

tions he may have to institutionalization.[3] Ironically, such admissions are considered to be "voluntary."[4] In contrast, adults facing institutionalization, *i.e.,* civil commitment, are entitled to a full panoply of procedural protections including a hearing, notice, right to be present at the hearing, right to subpoena witnesses, and right to appointed counsel.[5]

This disparity between the rights of adults and children has recently been challenged in a number of lawsuits throughout the country.[6] *Bartley v. Kremens*[7] is one of the few cases to have been decided on the merits thus far;[8] it is presently on appeal to the United States Supreme

3. This statement reflects the present state of affairs in the majority of jurisdictions. *See* note 11 *infra* for a delineation of the procedures implemented by the few states that have deviated from this norm.

4. The term voluntary admission, when used in conjunction with adult mental patients, *i.e.,* those over the age of eighteen years, refers to patients who request admission to the facility. *See, e.g.,* MD. ANN. CODE art. 59, § 11a (1972). However, minors are not allowed to independently seek admission to a mental institution. Thus the term "voluntary" admission when used in conjunction with minor mental patients connotes parental request for admission and in no way reflects the child's attitude or desires. In addition, adult voluntary patients may seek and obtain release at any time, whereas a child is unable to seek release until he or she reaches the statutory age of majority. The power to request a discharge lies solely with the parent.

5. *See* note 20 *infra.*

6. *E.g.,* Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975) (three-judge court), *prob. juris. noted,* 96 S. Ct. 1457 (1976); J.L. v. Parham, 412 F. Supp. 112 (M.D. Ga. 1976) (three-judge court); Kidd v. Schmidt, 399 F. Supp. 301 (E.D. Wis. 1975) (preliminary injunction against parental commitment statutes); Poe v. Weinberger, Civil No. 74-1800 (D.D.C., filed Aug. 28, 1975) (stayed pending decision in *Bartley*).

7. 402 F. Supp. 1039 (E.D. Pa. 1975) (three-judge court), *prob. juris. noted* 96 S. Ct. 1457 (1976).

8. An almost identical case was recently decided by a three-judge court in Georgia. J.L. v. Parham, 412 F. Supp. 112 (M.D. Ga. 1976) (three-judge court). The court held that the Georgia statute, GA. CODE ANN. § 88-503.1 (1971), providing for the voluntary admission of minor children to mental hospitals by parents or guardians was in violation of the due process clause of the fourteenth amendment. In describing the statute under review, the court stated:

> Neither the statutory scheme nor the practices and policies utilized by the defendants provide for any procedural safeguards. . . . [C]hildren are institutionalized without a hearing or other procedural safeguards; are hospitalized without initial or periodic consideration of placement in the least drastic environment necessary for treatment; and are not afforded a hearing at any time for the determination of an appropriate required time for discharge.
>
> In concept and practice the statute vests in parents and guardians . . . and in superintendents of state mental hospitals an unbridled discretion to admit and detain emotionally disturbed children in Georgia's mental hospitals at least until their 18th birthday.

412 F. Supp. at 136. The court then explained why parents and hospital superintendents should not be given such unchecked power over essential liberties and how due process would supply the necessary double check. *Id.* at 138-39. The Supreme Court has, however, granted a stay of the court's order and judgment. 96 S. Ct. 1503 (1976).

A similar issue was decided in Saville v. Treadway, 404 F. Supp. 430 (M.D. Tenn. 1974) (three-judge court). In that case, action was brought on behalf of patients of a state hospital and school for the mentally retarded, alleging constitu-

Court.[9] Plaintiffs in *Bartley* filed a class action on behalf of the named plaintiffs and all persons eighteen years of age or younger who have been, are, or may be admitted or committed to mental health facilities[10] in Pennsylvania under the Pennsylvania Mental Health and Retardation Act.[11] Plaintiffs contended that they were being denied due process and equal protection because Pennsylvania allows plaintiffs and their class to be detained — denied their liberty — in mental institutions without sufficient procedural safeguards.[12] The court concentrated on three basic questions: (1) Does the due process clause of the fourteenth amendment apply in this particular case; (2) If so, can the procedural protections secured by that provision be effectively waived by plaintiffs' parents, guardians ad litem, or persons standing in loco parentis; (3) What procedural protections are involved.

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tional violations in certain admission and operational practices. A three-judge court held that the Tennessee statute, TENN. CODE ANN. § 33-501 (Supp. 1975), permitting a parent, guardian or person having legal custody of a mentally retarded minor (or adult) to place the individual without restriction in the state hospital, did not comply with constitutional due process requirements. The court issued an order enjoining further hospital admissions pursuant to the provisions of the statute and requiring adherence to the alternative provisions set out by the court. The due process procedures ordered by the court provide for the creation of an Admissions Review Board authorized to conduct hearings. 404 F. Supp. at 438–40.

9. 96 S. Ct. 1457 (1976).

10. The court noted that the action concerned children who allegedly are mentally ill as well as children who are allegedly mentally retarded. 402 F. Supp. at 1041.

11. PA. STAT. ANN. tit. 50, § 4402–03 (1969). At the time the suit was filed, these statutory provisions were similar to the ones set out in note 2 *supra*. However, after plaintiffs filed the action, the Department of Public Welfare, pursuant to the Pennsylvania Mental Health and Mental Retardation Act of 1966, PA. STAT. ANN. tit. 50, § 4201(2) (1969), adopted additional procedural safeguards for children admitted or committed to institutions pursuant to the sections in question. The new regulations, set out in the court's opinion, permit a hearing for those juveniles thirteen and older but do not provide a time by which such a commitment hearing must be held. "With respect to children twelve years of age or younger, there is no requirement for a hearing, no less a designated time." 402 F. Supp. at 1042–43 n.5. Thus, Pennsylvania is now among the few states with provisions for procedures differing from the traditional "voluntary" admission procedure. Other states have deviated from the norm in various ways. Connecticut has interpreted its statute, CONN. GEN. STAT. ANN. § 17-187 (1975), as providing hearing rights to children. Melville v. Sabbotino, 30 Conn. Supp. 320, 313 A.2d 886 (1973). Illinois, in the case of *In re* Lee, No. 68 (JD) 1362 (Cook County Cir. Ct., Juv. Div., Ill. 1972), interpreted its statute, ILL. REV. STAT. ch. 91½ § 5-1 (1969), to permit minors to seek their own release without prior parental approval. Texas requires consent of the child prior to "voluntary" admission by the parent, although the required consent apparently need not be in writing. TEX. ANN. STAT. art. 5547-23 (1958). Mississippi and South Dakota apparently have no statutory provision for any voluntary commitment to mental hospitals. Alabama, Iowa, Louisiana, Nebraska, Rhode Island and North Carolina make no distinction in their statutes concerning differing age groups. However a North Carolina court recently held that children are entitled to due process procedures in mental commitment proceedings. *In re* Long, 25 N.C. App. 702, 214 S.E.2d 626 (1975).

12. 402 F. Supp. at 1042. Similar allegations were made in the other cases filed, *see* note 6 *supra*.

The court concluded that the due process clause applies to children facing institutionalization;[13] that parents or guardians cannot waive the procedural protections afforded children by virtue of that clause;[14] and that the process due a child includes: a hearing within seventy-two hours from the date of initial detention to determine whether there is probable cause to believe institutionalization is necessary; a post-commitment hearing within two weeks from the date of initial detention; written notice, including the date, time, and place of the hearing, and a statement of the grounds for the proposed commitment; the right to counsel at all significant stages of the commitment process and if indigent the right to appointment of free counsel; the right to be present at all hearings concerning the proposed commitment; a requirement that the court find by clear and convincing proof that the child is in need of institutionalization; and, the right to confront and to cross-examine witnesses against him, to offer evidence in his own behalf, and to offer testimony of witnesses.[15]

The three-judge court entered a declaratory and injunctive order implementing its judgment. The court ordered the defendants to refrain from accepting or continuing the admission or commitment to mental institutions of any class member unless the specified constitutional protections are provided so as to minimize the possibility of erroneous commitment and to avoid the stigma and deprivation of institutionalization.[16] The court further ordered the defendants to initiate procedures, commencing immediately, to ensure that all class members presently committed under the challenged statute are either discharged, released or recommitted according to the procedures required by the opinion.[17] However, the court's order has been stayed by the United States Supreme Court.[18] The emphasis in defendant's application for a stay was on alleged jurisdictional errors.[19] Although the Supreme Court may focus on these procedural problems, the substantive decision seems unlikely to escape eventual review.

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13. 402 F. Supp. at 1945–47.

14. *Id.* at 1047–48.

15. *Id.* at 1053.

16. Slip order at 6–7 (Nov. 17, 1975).

17. *Id.* at 8.

18. 96 S. Ct. 558 (1975). Defendants first petitioned the three-judge court for a stay, but it was unanimously denied. They then petitioned Mr. Justice Brennan, in his capacity as Circuit Justice, and he also denied the stay. The application was resubmitted to Mr. Justice Rehnquist and by him referred to the entire court. The stay was subsequently granted.

19. Defendants, citing Preiser v. Rodriguez, 411 U.S. 475 (1973), maintain that the lower court erred in hearing the case because habeas corpus, rather than a civil rights action, is the proper remedy to be used in challenging the legality of one's confinement. By entertaining plaintiffs' challenge to the fact of their confinement within the context of a civil rights action, the court, it is argued, did not require exhaustion of state remedies. In addition, defendants charge that the lower courts' action in *Bartley* constitutes improper judicial legislation. Defendants also challenge the propriety of retroactive relief. Defendants' Application For A Stay at 3–6 (Dec. 8, 1975).

The *Bartley* court's conclusion that persons committed to mental institutions were being denied liberty and were thereby entitled to due process is novel only to the extent that it is applied to children. It is virtually beyond dispute that the state may not commit adults to mental institutions without affording them substantial procedural safeguards.[20] The decision in *Bartley* evinced a realization that the child, as well as the adult, who faces the possibility of being physically confined for an indeterminate period, clearly has an interest within the contemplation of the language of the fourteenth amendment.[21] In determining what safeguards were necessary to protect this interest, the court considered each procedural right of which

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20. Chief Justice Burger recently stated, "Commitment must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding." O'Connor v. Donaldson, 422 U.S. 563, 580 (1975) (concurring opinion). In other cases, the Supreme Court has consistently recognized that commitment proceedings, whether denominated civil or criminal, must comport with due process. *See* McNeil v. Director, 407 U.S. 245 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Specht v. Patterson, 386 U.S. 605 (1967); Baxstrom v. Herold, 383 U.S. 107 (1966).

The lower federal courts have uniformly upheld the application of due process to adult mental commitments, mandating procedures similar or identical to those required by the district court in *Bartley*. *See, e.g.,* Sarzen v. Gaughan, 489 F.2d 1076 (1st Cir. 1973); *In re* Ballay, 483 F.2d 648 (D.C. Cir. 1973); *In re* Barnard, 455 F.2d 1370 (D.C. Cir. 1971); Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968); *In re* Basso, 299 F.2d 933 (D.C. Cir. 1962); Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Hawaii 1976); Kendall v. True, 391 F. Supp. 413 (W.D. Ky. 1975); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974) (three-judge court); Bell v. Wayne County, 384 F. Supp. 1085 (E.D. Mich. 1974); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972) (three-judge court), *vacated and remanded on other grounds,* 414 U.S. 473 (1974), *judgment reinstated,* 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded on other grounds,* 421 U.S. 957 (1975) [for purposes of this Comment, only the original lower court decision will hereinafter be cited]; Dixon v. Attorney General, 325 F. Supp. 966 (M.D. Pa. 1971). For a comprehensive review of the state of the law of civil commitment as it relates to adults, see *Developments in the Law — Civil Commitment of the Mentally Ill,* 87 HARV. L. REV. 1190 (1974).

21. The court stated, "The particular question here is whether or not a child's interest in not being institutionalized . . . is safeguarded by the Fourteenth Amendment." 402 F. Supp. 1046. The court had little trouble answering this question in the affirmative. *Id.* at 1046–47. The three-judge court in J.L. v. Parham, 412 F. Supp. 112 (M.D. Ga. 1976), also discussed the child's liberty interest:

> [T]his case raises the most important question of every child's constitutional right to liberty, not only the liberty that includes freedom from bodily restraint, . . . but also the liberty that includes the freedom of an ordinary, every-day child in these United States of America . . . .
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> To unnecessarily confine and detain a child in a mental hospital . . . is to deprive him of a child's freedom just as much if not more so than a child is deprived of his freedom by being civilly committed as a juvenile delinquent. . . .
>
> "In view of this, it would be extraordinary if our Constitution did not require the procedural regularity . . . implied in the phrase 'due process' " . . . for children to be confined and detained under Georgia's voluntary admission statute.

Id. at 136–37.

the plaintiffs were allegedly deprived, weighing as to each the competing interests of plaintiffs and the state.[22]

The court, in addition to deciding that due process applied and what process was due, considered the "difficult and unique"[23] question of whether parents, guardians ad litem, or persons standing in loco parentis may effectively waive the personal rights of children.[24] The crux of this question is a confrontation between the liberty interest of the child and "the consistently recognized authority of parents to direct the rearing of their children."[25] Both interests, the child's and the parents', are constitutionally protected.[26] The court in *Bartley,* seemingly as a prophylactic measure,[27]

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22. Plaintiffs' interest is in being free from the wrongful and unwarranted deprivation of their liberty. The state's interests are threefold. It has an interest in "the mental health of children (parens patriae), an interest in preserving the family unit and maintaining parental authority over children, and an interest in confining, for the protection of society, those persons who pose significant danger to the community (police power)." 402 F. Supp. at 1048.

Other federal courts have struck similar balances in upholding the application of various due process protections in the context of adult civil commitment. *See* note 20 *supra.* For a discussion of the propriety of the procedures mandated, see *Developments in the Law — Civil Commitment of the Mentally Ill, supra* note 20, at 1271–1316.

23. 402 F. Supp. at 1047.

24. The same question dominates several of the pending suits; *see, e.g.,* Poe v. Weinberger, Civil No. 74–1800 (D.D.C., filed Aug. 28, 1975), "The sole question in the instant case is whether juveniles may have the foregoing procedural safeguards waived for them by their parents or guardians." Memorandum in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Motion to Dismiss or in the Alternative for Summary Judgment, at 3.

The Supreme Court has not specifically addressed this issue. While the Court has repeatedly required that a juvenile's constitutional rights be protected from infringement, previous cases presented situations where the interests of the parents were allegedly aligned with those of the juvenile against the State. A contrary situation is presented by *Bartley* where the interests of parent and child are in conflict. *See* notes 144–52 and accompanying text *infra.* However, there are a few older Supreme Court cases, noted in Plaintiffs' Motion to Affirm (filed in the Supreme Court, Feb. 23, 1976), which can be read to imply that parents and guardians cannot act to waive or prejudice the rights of their children or wards. *See* O'Hara v. MacConnell, 93 U.S. 150 (1876) (court must assure that minor has independent representation in proceeding to deprive her of property; notice and opportunity to be heard required); Hoyt v. Hammekin, 55 U.S. 346, 351 (1852) (a guardian cannot dispose of the property of his ward without the permission of the judge of his domicile); Bank of the United States v. Ritchie, 33 U.S. 128 (1834) (minor's guardian cannot consent, absent hearing and proof before a court, to the relief sought in a proceeding against the child).

25. 402 F. Supp. at 1047.

26. *See* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (parents' interest in directing upbringing of their children constitutionally protected); *In re* Gault, 387 U.S. 1 (1967) (child's liberty interest constitutionally protected).

27. The court stated:

> [I]f we could find that in all instances parents act in the best interest of their children, we might also find that parents may waive constitutional rights of their children. Unfortunately, as such a graphic example as parental child abuse illustrates, this is not the case. In deciding to institutionalize their children, parents,

resolved the conflict of interests in favor of the child's liberty.[28] The propriety of this resolution will be the focus of this Comment.

THE SOURCE OF THE CONFLICT BETWEEN PARENT AND CHILD

The state legislatures, in enacting "voluntary" admissions statutes for minors, did not necessarily anticipate a conflict of interest between parent and child. Rather, it seems that a number of assumptions were made about the role of parents and hospital administrators in the admission process and about the nature of hospitalization itself.[29] The assumptions can be summarized as follows: (1) Parents[30] act in the best interests of their child and therefore there is an identity of interest between the child and the parent seeking his hospitalization; (2) Even if parents might seek hospitalization in inappropriate circumstances, admitting physicians at mental health facilities would be able to identify such cases and block their admission; (3) Since institutionalization is wholesome and therapeutic, the admission procedure is infused with a benign purpose which obviates the need for commonly accepted safeguards.[31] These suppositions are best evaluated seriatim.

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as well as guardians ad litem or persons standing in loco parentis, may at times be acting against the interests of their children. With this in mind, we must agree with Judge Judd in New York State Association for Retarded Children, 357 F. Supp. 752, 762 (E.D.N.Y. 1973), that in the absence of evidence that the child's interests have been fully considered, parents may not effectively waive personal constitutional rights of their children.

402 F. Supp. at 1047–48.

28. This resolution can also be viewed as an accommodation of both interests as opposed to a valuation of one above the other. *See* Memorandum in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendant's Motion to Dismiss or in the Alternative for Summary Judgment, at 3, Poe v. Weinberger, Civil No. 74–1800 (D.D.C., filed Aug. 28, 1975).

Under D.C. Code §§ 21–511 and 512 which provide for the "voluntary" commitment of juveniles by their parents, parental control is maintained at the total expense of the juvenile's liberty interest. In contrast, providing a juvenile with the full panoply of procedural protections before commitment would protect the juvenile from wrongful incarceration without undermining legitimate parental interests. For the real parental interest at stake is not custody and control for their own sake, but rather for the purpose of assuring that the child receives appropriate and needed treatment.

29. The Draft Act Governing Hospitalization of the Mentally Ill (Public Health Service Publication No. 51, 1951) promulgated by the National Institute of Mental Health encouraged "voluntary" admission of children by their parents and most states adopted such provisions. Although legislative history is scarce, writers and litigators in the mental health field have suggested several basic premises which appear to have provided support for the legislation. *See* text accompanying note 31 *infra*.

30. References will be to "parents" only, however, what is said applies equally to guardians or persons standing in *loco parentis*.

31. Petitioner's Trial Brief at 4, Cox v. Godsey, No. A–4662 (Ch. Ct., pt. II, Davidson County, Tenn., Dec. 19, 1974) (case challenging Tennessee's voluntary admission statute, settled out and a two page consent decree issued.) *See* Ellis, *supra* note 2, at 850–68.

Parents seek institutionalization of their children for a variety of reasons, some of which do not reflect the child's best interests.[32] Some parents may try to shift the responsibility for their own, or for shared derelictions to their children.[33] This particular problem was recognized by the court in *In re Sippy*,[34] when it refused to place a child in a psychiatric facility after the mother conceded that she herself had a strong temper, had never been able to evaluate her own problems, and had difficulty avoiding clashes with her daughter. There is also a tendency for parents to seek hospitalization for their child in response to the pressures of familial dysfunction in general. Recognition of this tendency is reflected in the present trend of mental health professionals who are increasingly turning to treatment of the family unit as a more realistic subject of therapy than the individual members themselves.[35] Parental misperception of mental illness is another factor influencing decisions to commit;[36] and even chance may play a considerable role.

> In a crisis situation, parents may go to the first facility about which they are told or to whatever facility is closest. Lacking knowledge of other facilities and alternatives, the family may see hospital care as the only approach to the crisis. For poor families, dependent upon public institutions, this problem is compounded by a more limited number of resources from which to choose.[37]

Many societal pressures operate to induce parents to institutionalize a mentally retarded child. These pressures include uninformed medical opinions and the parents' own success-oriented expectations of their

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32. The court in J.L. v. Parham, 412 F. Supp. 112, 138 (M.D. Ga. 1976) (three-judge court) noted:

> Most parents accept and faithfully perform their parental duties and given this unlimited statutory authority to admit their children to a mental hospital, would use that authority only when it is genuinely necessary to do so. Unfortunately, as the evidence indicates, there are some parents who abuse that authority and who under the guise of admitting a child to a mental hospital actually abandon their child to the state. As Dr. Filley suggested in his deposition, some still look upon mental hospitals as a "dumping ground."

33. Vogel & Bell, *The Emotionally Disturbed Child as the Family Scapegoat*, in A MODERN INTRODUCTION TO THE FAMILY 412–27 (N. Bell & E. Vogel eds. rev. ed. 1968); Ellis, *supra* note 2, at 859–60; *see* J.L. v. Parham, 412 F. Supp. 112 (M.D. Ga. 1976) (three-judge court).

34. 97 A.2d 455, 459 (D.C. Mun. Ct. App. 1953) (proceeding by mother to have her daughter committed to psychiatric school on ground that daughter was habitually beyond mother's control).

35. *See* GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, TREATMENT OF FAMILIES IN CONFLICT (1970); N. ACKERMAN, TREATING THE TROUBLED FAMILY (1966); T. LIDZ, S. FLECK AND A. CORNELLISON, SCHIZOPHRENIA AND THE FAMILY (1965).

36. *See* note 80 *infra*.

37. Affidavit of Dr. Eli Charles Messinger, *supra* note 1, at 9; Ellis, *supra* note 2, at 851–52.

children.[38] A number of courts have recognized the possibility of questionable parental motives in the realm of mental retardation. In *Horacek v. Exon,*[39] Judge Urbom stated: "I cannot be insensitive to the possibility that the interests of the parents may conflict with those of the children residing at the Beatrice State Home. While the parents in all good conscience may desire one remedy, or a specific type or style of treatment for their children, it would not necessarily be in the best interest of the children." The court in *New York Association for Retarded Children v. Rockefeller*[40] made a similar observation;

> There may be a fundamental conflict of interest between a parent who is ready to avoid the responsibility of caring for an abnormal child, and the best interests of the child. A "voluntary admission" on the petition of parents may quite properly be treated in the same category as an "involuntary admission" in the absence of evidence that the child's interests have been fully considered.[41]

It is thus apparent that there is sufficient professional and judicial recognition of the potential conflict of interest to refute the assumption that parent and child always have a compatible interest in the child's institutionalization.

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38. Murdock, *Civil Rights of the Mentally Retarded — Some Critical Issues,* 7 FAM. L.Q. 1, 10 (1973). *See* note 80 *infra.* The court in *Bartley* identified several of these pressures:

> Patient number 13,212, an educable mongoloid boy with the capacity to participate in many educable and trainable activities and who can be helped by an active special elementary program in public schools, was institutionalized in Polk State Hospital for a one-to-two-week period so that the other members of his family could go on a family vacation. Patient number 288, a mentally retarded child, was placed in Western State Hospital because of a poor family situation. The mother of the child did not get along well with the child, and the family was afraid that she would have another nervous breakdown if the child were not placed in Western State Hospital. Patient number 281, a mentally retarded child, was placed in a state institution because she had become a management problem to both her parents and the community. Patient number 15, a mentally retarded child, was placed in Western State Hospital because the child interfered with the routine of the household and disturbed family members. The placement was based on a fear that if the child remained in his home, the mother might break down, the marriage of the child's parents might end in separation, the father's health might fail, and an adolescent daughter might be pushed into a premature marriage to escape an unhappy home.

402 F. Supp. at 1044.

39. 357 F. Supp. 71, 74 (D. Neb. 1973). Plaintiffs, represented through their parents, brought a civil rights action pursuant to 42 U.S.C. § 1983 (1970), on behalf of themselves and all other persons similarly situated, alleging that the physical conditions, care, treatment, and training provided by the defendants at the Beatrice State Home for the mentally retarded did not meet constitutional standards.

40. 357 F. Supp. 752 (E.D.N.Y. 1973). The action was brought on behalf of residents of a New York institution for the mentally retarded against certain New York officials for equitable relief relating to the treatment and care of residents.

41. *Id.* at 762 (citations omitted). *Accord,* Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968); Saville v. Treadway, 404 F. Supp. 430 (M.D. Tenn. 1974).

Most voluntary admissions statutes require the approval of the admitting psychiatrist at the facility in order to complete the commitment process.[42] This commitment process, however, contains several basic problems which make it virtually impossible for the psychiatrist to serve as an effective check on inappropriate parental efforts to institutionalize their child.[43] The screening interviews are very often short and perfunctory,[44] and the child may be hesitant to reveal much information about himself in this setting. The quality of the information obtained from the child tends to depend upon the psychiatrist first securing the child's trust and confidence, which he is unlikely to do in the context of a "voluntary" admissions interview.[45] Psychiatrists' tendency toward overdiagnosis is another problem,[46] as is the absence of any concrete or consistent standards against which the physician's findings are to be measured. One psychiatrist may feel that only persons who are gravely disabled should be institutionized for long-term care in a state mental hospital, while another may focus upon the person's dangerousness to others or to himself.[47] An even

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42. *See, e.g.,* MD. ANN. CODE art. 59, § 11(a) (1972), which provides, "The admission request must be formal, written and assented to by an admitting physician at the facility."

43. NATIONAL JUVENILE LAW CENTER, ST. LOUIS UNIVERSITY SCHOOL OF LAW, LEGAL CHALLENGES TO THE "VOLUNTARY" ADMISSION OF CHILDREN TO MENTAL INSTITUTIONS 54–62 (available through National Clearinghouse for Legal Services) [hereinafter cited as LEGAL CHALLENGES].

44. Ellis, *supra* note 2, at 864. Ellis cites inadequate professional staffing and lack of funds to conduct detailed investigations of the family background as reasons for the poor quality of pre-commitment psychiatric investigations.

45. Affidavit of Dr. Eli Charles Messinger, *supra* note 1, at 10. Dr. Messinger there states:

> Under the present system of volunteering juveniles into mental hospitals, it is not clear to whom the psychiatrist owes a duty. The parent is requesting placement, but the juvenile is the one being hospitalized. Placed between parent and child, the psychiatrist comes to be viewed as both doctor and jailor. This undermines his or her credibility during the interview, and consequently limits the type and quality of information received.

46. *See* T. SCHEFF, BEING MENTALLY ILL: A SOCIOLOGICAL THEORY 105–21 (1966); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,* 62 CALIF. L. REV. 693, 720–23 (1974). Dr. Messinger also commented on this phenomenon:

> Psychiatrists have a tendency to recommend hospitalization when in doubt. By erring on the side of admission rather than out-patient treatment, a psychiatrist does not have to justify his actions to the party requesting hospitalization of the juvenile, and does not have to fear that he or she will be held responsible if something should happen to the juvenile after hospitalization has been denied. These practical considerations provide a subtle but strong bureaucratic pressure for the psychiatrist to decide for hospitalization where doubts may exist.

Affidavit of Dr. Eli Charles Messinger, *supra* note 1, at 11.

47. *See* Lynch v. Baxley, 386 F. Supp. 378, 391 n.8(M.D. Ala. 1974):

> Not only is mental illness an elusive concept to define and difficult to diagnose with precision, but the need for confinement in a given case is a determination about which psychiatrists often disagree. One explanation for this is that psychia-

more basic problem is presented by the fact that psychiatric judgments, because of the nature of the science, are often unreliable.[48] In addition, psychiatrists confronted with a "voluntary" admission are likely to accede to the parents' wishes,[49] which further destroys the validity of their assessment. The court in *In re Long*[50] recognized the existence of these various problems:

> At the initial examination there may be an understandable tendency to over-diagnose. In other words, a psychiatrist may be predisposed to find illness rather than health at the first examination on the assumption that it is better to err on the side of caution. Also, where a parent commits a child for treatment, the examining doctor may quite naturally identify with the interest of the parent. If either of these happens, the doctor would be unable to act effectively as a screening agent at the initial stage of examination.

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trists, like most other people, have wide differences of opinion about which sorts of dangers justify incarceration and which do not.

The court in J.L. v. Parham, 412 F. Supp. 112, 134 (M.D. Ga. 1976), noted that "In practice the language 'evidence of mental illness and to be suitable for treatment' is as indefinite and elusive to the psychiatrists employed by the state as it is to a layman." The court proceeded to quote the portion of the deposition of Dr. John P. Filley, Director, Child and Mental Health Services, which discussed this problem.

48. *See* Rosenhan, *On Being Sane in Insane Places*, 13 SANTA CLARA LAW. 379 (1973); Ennis & Litwack, *supra* note 46, at 698–708 (1974). The court in J.L. v. Parham, 412 F. Supp. 112 (M.D. Ga. 1976) (three-judge court) relied on this fact in its response to the state's argument that children are constitutionally protected by the independent judgment exercised by superintendents of the state's mental hospitals. The court stated:

> [P]sychiatrists like all humans are capable of erring. Since they are capable of erring, psychiatrists like parents cannot statutorily be given the power to confine a child in a mental hospital without procedural safeguards being imposed to guard against errors in judgment and/or the arbitrariness that the best of us humans exhibit from time to time.

Id. at 138.

49. LEGAL CHALLENGES, *supra* note 43, at 61–62; Ellis, *supra* note 2, at 867–68. Ellis states:

> While the goal of the psychiatrist will be expressed — and perceived — as the best welfare of the child-patient, it is the parent who has come to seek help, whose situation seems most desperate, who seems the most reliable source of information about what is wrong, who is closest to the psychiatrist in age and social outlook, and who is paying the psychiatrist's fee.

Ellis at 868. *See also* Roth & Lerner, *Sex Based Discrimination in the Mental Institutionalization of Women*, 62 CALIF. L. REV. 789, 801 (1974); "[W]hen family conflict is a factor in the commitment decision, disagreements tend to be resolved in favor of the person in the superior economic status position."

50. 25 N.C. App. 802, 214 S.E.2d 626, 629 (1975). *Long* involved a habeas corpus action brought by a minor. The court held that a minor was entitled to due process protection with respect to confinement in a state mental health facility. The court ordered the minor petitioner released.

Other courts have also evidenced an awareness of the unreliability of psychiatric opinion.[51] One indication of this is the trend in commitment proceedings toward requiring establishment of the need for hospitalization by proof beyond a reasonable doubt.[52] This trend can be interpreted to reflect possible misgivings about the accuracy of psychiatric testimony which usually determines the outcome of such proceedings. Apparently for the same reason, a three-judge federal court in Pennsylvania, in *Dixon v. Attorney General of Pennsylvania,*[53] declared unconstitutional a statute allowing commitment of an individual upon the certification by two doctors that they had found the person to be mentally ill. It was thus found that a psychiatrist's decision to commit a person was an inadequate substitute for the procedural protections required by due process. In light of these various judicial pronouncements and observations by mental health professionals, the belief that admitting psychiatrists serve as an effective check on misguided parental efforts to institutionalize their children is no longer justified.

The third belief under which legislators apparently operated when they devised "voluntary" admission statutes for minors concerns the nature of hospitalization itself. Mental hospitals seem to have been envisioned much the same as regular medical hospitals, as facilities in which a child could receive treatment for a particular illness. On the contrary, the

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51. The California Supreme Court recently stated:

> In light of recent studies it is no longer heresy to question the reliability of psychiatric predictions. Psychiatrists themselves would be the first to admit that however desirable an infallible crystal ball might be, it is not among the tools of their profession. It must be conceded that psychiatrists still experience considerable difficulty in confidently and accurately diagnosing mental illness.

People v. Burnick, 14 Cal. 3d 306, 325–26, 121 Cal. Rptr. 488, 501, 535 P.2d 352, 365 (1975) (proper standard of proof in mentally disordered sex offender proceedings is proof beyond a reasonable doubt).

52. *See, e.g., In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972); People v. Burnick, 14 Cal. 3d 306, 121 Cal. Rptr. 488, 535 P.2d 352 (1975); State *ex rel.* Matalik v. Schubert, 57 Wis. 2d 315, 204 N.W.2d 13 (1973); Denton v. Commonwealth, 383 S.W.2d 681 (Ky. 1964). It is interesting to note the *Bartley* court's conclusion that the fact finder in a hearing on commitment of a child as mentally ill or mentally retarded must apply the standard of clear and convincing proof as opposed to standards of beyond a reasonable doubt or preponderance of the evidence. The court explained its decision stating:

> Applying a preponderance standard creates too great a risk of erroneous commitment, wrongfully depriving a child of his interest in liberty, an interest of 'transcending value,' and, given the subjectivity and 'relatively undeveloped state of psychiatry as a predictive science,' requiring proof beyond a reasonable doubt creates too great a risk of erroneously releasing children in need of institutionalization.

402 F. Supp. 1052–53 (footnotes omitted).

53. 325 F. Supp. 966 (M.D. Pa. 1971).

therapeutic value of institutionalization, especially with regard to children, is thought to be highly questionable.[54]

> It is important to remember that hospitalization should not necessarily be equated with psychiatric treatment. In large hospitals, the limited time of psychiatrists is normally spent on admission procedures, routine management and administrative matters leaving little time for therapeutic discussion with patients about their problems. Thus patients who need intensive psychiatric counseling ironically have less chance of receiving it inside rather than outside of a hospital.[55]

Absence of treatment is not by any means the only problematic characteristic of mental hospitals; though there may be little or no positive action taken, the child is being bombarded by negative experiences. He or she is cut off from the outside world and subjected to very rigid and restrictive social control, including a loss of privacy.[56] This deprivation of liberty has a number of detrimental consequences. The institutionalization itself may induce aberrant behavior.[57] The child in essence may *learn* to be mentally ill. The personality changes resulting from confinement have been described as "institutional neurosis", a "man-made disease" characterized by:

> apathy, lack of initiative, loss of interest more marked in things and events not immediately personal or present, submissiveness, and sometimes no expression of feelings of resentment at harsh or unfair orders. There is also a lack of interest in the future and an apparent inability to make practical plans for it, a deterioration in personal habits, toilet, and standards generally, a loss of individuality, and a resigned acceptance that things will go on as they are — unchangingly, inevitably, and indefinitely.[58]

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54. *E.g.*, Schwitzgebel, *The Right to Effective Treatment*, 62 CALIF. L. REV. 936, 939–48 (1974); Levitt, *Psychotherapy with Children: A Further Evaluation*, 1 BEH. RES. & THERAPY 45, 49 (1963).

55. Affidavit of Dr. Eli Charles Messinger, *supra* note 1, at 3. An example of the limited extent of interaction between doctor and patient was illuminated at the trial of the now landmark case. O'Connor v. Donaldson, 422 U.S. 563 (1975). Evidence was introduced to show that Donaldson had little contact with staff psychiatrists. He saw his first doctor six times in eighteen months for a total of less than one hour and his second doctor (who succeeded Donaldson's first physician) for at most two hours over an eight and one-half year period. 493 F.2d 507, 514 (1974).

56. *See* E. Goffman, *On the Characteristics of Total Institutions* in ASYLUMS 1 (1961). Goffman is a sociologist, and this study is based in large part on his year of field work at Saint Elizabeth's Hospital in Washington, D.C. His objective during that year was to learn about the social world of the hospital inmate as this world is subjectively experienced by the inmate. To that end, he spent most of his days with the patients and although he did not actually allow himself to be committed, he was quite successful in involving himself in the daily routine to which patients were subjected.

57. Ellis, *supra* note 2, at 869.

58. D. VAIL, DEHUMANIZATION AND THE INSTITUTIONAL CAREER 142 (1966) *quoting from* R. BARTON, INSTITUTIONAL NEUROSIS (1959) [hereinafter cited as VAIL]. The factors commonly found in the environment which are associated with these characteristics include: 1) loss of contact with the outside world; 2) enforced

To a child, the premium placed on compliance, conformity and passivity[59] is exceptionally harmful. Juveniles need to establish a sense of initiative and to develop self-respect and self-confidence.[60] Hospital routine is inimical to these needs, stifling any sense of individuality or personal responsibility. Other negative aspects of institutionalization include lack of peer group interaction and constant exposure to chronic mental illness.[61] In addition, psychoactive drugs are used extensively both for medical and administrative purposes[62] despite the fact that these drugs have dangerous side effects and that great caution should be used in their administration.[63] The adverse consequences of institutionalization continue upon the individual's release. Not only is the child likely to have a difficult time adjusting to everyday life, but in addition, he or she must contend with the negative labeling that tends to follow institutionalization.[64] Again, the courts have not been oblivious to these very serious problems. In the case of *In re Ballay*[65] the court stated that "institutionalization may have devastating side effects upon those committed, particularly where they were not initially in need of treatment." The court in *Lessard v. Schmidt*[66] elaborated on this theme:

> In addition to the statutory disabilities associated with an adjudication of mental illness, and just as serious, are the difficulties that the committed individual will face in attempting to adjust to life outside the institution following release. The stigma which accompanies any hospitalization for mental illness has been brought to public attention in the news stories surrounding the recent resignation of a vice-presidential aspirant from further candidacy. Evidence is plentiful that a

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idleness; 3) bossiness of medical and nursing staff; 4) loss of personal friends, possessions and personal events; 5) drugs; 6) ward atmosphere; 7) loss of property outside the institution. VAIL at 143–44.

59. Goffman gives some indication of this premium in his explanation of the routine admissions procedures in mental hospitals:

> Admission procedures might better be called 'trimming' or 'programming' because in thus being squared away the new arrival allows himself to be shaped and coded into an object that can be fed into the administrative machinery of the establishment, to be worked on smoothly by routine operations.

GOFFMAN, *supra* note 56, at 16.

60. Affidavit of Dr. Eli Charles Messinger, *supra* note 1, at 4.

61. *Id.* The latter most often occurs when juveniles are placed on adult wards.

62. The main administrative purpose is to facilitate smooth operation of the ward.

63. Hearings on the Abuse and Misuse of Drugs in Institutions Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. (testimony of Gail Marker, M.S.W., of the Mental Health Law Project, July 31, 1975).

64. Ellis, *supra* note 2, at 870. Ellis points out that the labels not only can affect other people's perceptions of the individual but also can have a powerful impact on the self concept of the person institutionalized.

65. 483 F.2d 648, 667 (D.C. Cir. 1973) (appeal from commitment order).

66. 349 F. Supp. 1078, 1089 (E.D. Wis. 1972) (three-judge federal court struck down Wisconsin's civil commitment statute on the grounds that prospective patients were denied due process).

> former mental patient will encounter serious obstacles in attempting to find a job, sign a lease or buy a house.

The District of Columbia Circuit Court of Appeals in *Matthews v. Hardy*[67] found that "a person mistakenly placed in a mental hospital might suffer severe emotional and psychic harm," and that such an individual "may not be mentally ill at all. Yet . . . he will be exposed to physical, emotional, and general mental agony. Confined with those who are insane, told repeatedly that he too is insane and indeed treated as insane, it does not take much for a man to question his own sanity and in the end to succomb to some mental aberration . . . ."[68]

With these revelations concerning the detrimental and anti-therapeutic nature of mental institutions, the third and final assumption regarding institutionalization of children is amply refuted. Stripping away these presumptions has quite definitely exposed a conflict of interest between parent and child. It is this conflict which the court in *Bartley* dealt with through the provision of specific due process protections.

ANALOGOUS PARENT — CHILD CONFLICTS

With the conflict thus identified, it is useful to consider analogous areas of the law where similar confrontations between the rights of parents and children have been encountered. These areas include consent to medical treatment, parental tort immunity, child abuse and neglect, and ungovernability.[69] The reconciliations of conflicting interests reached in these various areas support the propriety of the *Bartley* resolution.

Consent to Medical Treatment

The responsibility and power of the parent in deciding to institutionalize a child for mental health care is closely paralleled by that afforded the parent in the area of physical health by virtue of the parental consent doctrine. This common law doctrine, requiring either express or implied consent of the parent to authorize medical treatment of a minor,[70] evolved from the belief that a minor is incapable of making intelligent decisions regarding medical treatment and therefore, the child's parents must have the authority to give or withhold consent in the child's behalf.[71] The requirement of consent is thus perceived as a means of protecting and

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67. 420 F.2d 607, 611 (D.C. Cir. 1969) (action brought by prisoner challenging his transfer to a mental hospital).

68. *Id., quoting from* United States *ex rel.* Schuster v. Herald, 410 F.2d 1071, 1078 (2d Cir. 1969).

69. Additional relevant areas not covered in this Comment include adoption and custody. For discussion of the latter, see Ellis, *supra* note 2, at 879–80; Levin, *Guardian* Ad Litem *in a Family Court*, 34 MD. L. REV. 341 (1974).

70. Bonner v. Moran, 126 F.2d 121, 122 (D.C. Cir. 1941).

71. *See* Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305, 309 (1974).

helping the minor, the same laudable objectives presumptively underlying the present voluntary admissions procedures for minors.

Giving parents the right to make legally binding decisions in regard to the health needs of their children (both physical and mental) does not, in and of itself, insure protection of the minor. Only if parents are capable of perceiving the child's needs and are willing to meet them will the child actually benefit.[72] Acknowledgement of this underlying corollary has given rise to increased recognition of the independent rights of children in situations where parents and children are likely to have conflicting interests. One example of such a conflict is apparent when parents withhold consent despite an obvious need for medical attention on the part of the minor.[73] "This type of case is important because the conceptual conflict between the parents' power of decision regarding the physical integrity of their child and the detached, objective assessment of what is in the best interests of the child comes into sharp focus."[74] The classic case of this nature is that of the parents who, because of adherence to particular religious or philosophic beliefs, refuse to consent to a blood transfusion or other medical treatment necessary to preserve or maintain their child's health.[75]

In this realm, the state, exercising its *parens patriae* power,[76] is often willing to intervene in the decision making process in order to preserve "the best interests of the child."[77] In many instances, judicial proceedings are initiated under the state neglect statute in order to justify court order

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72. *See* Wilkins, *Children's Rights: Removing the Parental Consent Barrier to Medical Treatment of Minors,* 31 ARIZ. ST. L.J. 31, 34–35 (1975) [hereinafter cited as Wilkins]. This fact is reflected in the assertion made by counsel in Memorandum of Points and Authorities in Response to Petitioner's Return, at 11, *In re* Paul J.B., 1 Crim. 14811 (Cal. Ct. App., 1st App. Dist., filed Dec. 30, 1975):

> Most parents are not themselves trained in the diagnosis or treatment of mental illness. Although their observations and information concerning their children would be invaluable in determining whether a child should be placed in a mental hospital, there is no reason to suppose that the average parent possesses the expertise essential to making the ultimate decision. That the parent is concerned and knowledgeable about his own child does not impute to him knowledge regarding the adolescent program at Napa State Hospital.

73. Wilkins, *supra* note 72, at 47–49, 55–56.

74. *Id.* at 47.

75. *E.g., In re* Sampson, 65 Misc. 2d 685, 317 N.Y.S.2d 641 (Family Ct. 1970), *aff'd* 37 App. Div. 668, 323 N.Y.S.2d 253 (1971); *In re* Clark, 21 Ohio Op. 2d 86, 185 N.E.2d 128 (C.P. Lucas County Dom. Rel. Div. 1962); *In re* Seiferth, 309 N.Y. 80, 127 N.E.2d 820 (1955).

76. Under the *parens patriae* doctrine the state has a duty to protect all citizens who cannot protect themselves. This duty encompasses protection of infants from their parents and others who may harm them. Thus, while parents are afforded maximum latitude in child rearing, there is no immunity from state interference should circumstances require it. For a discussion of the historical development and impact of the *parens patriae* doctrine, see Note, *The Parens Patriae Theory and Its Effect on the Constitutional Limits of the Juvenile Court Powers,* 27 U. PITT. L. REV. 894 (1966).

77. *See, e.g., In re* Karwath, 199 N.W.2d 147, 150 (Iowa 1972).

of medical treatment over parental objection.[78] Comparing state intervention in medical treatment cases to the admission procedures for children in mental institutions, James W. Ellis of the Mental Health Law Project stated:

> The *parens patriae* doctrine allows courts to adjust the parent-child relationship in order to prevent harm to the child. *Parens patriae* should, at a minimum, permit courts to review parental discretion in commitment cases where wrongful and unnecessary confinement may also prove very damaging to the child.[79]

Another similarity indicative of the need for state intervention via court review lies in the fact that, just as personal convictions of the parents influence their decision to consent to medical treatment, so too do personal convictions influence their decision to institutionalize their child.[80] In the context of medical treatment the courts have agreed to adopt a balancing approach, weighing the relative importance of the prescribed treatment on one hand and the reasonableness of the parents' objections on the other.[81] Thus there should be no basis for prohibiting judicial scrutiny in the voluntary admissions area where parental beliefs are similarly being implemented at the possible expense of the child. Such scrutiny in both situations should be viewed as a means of facilitating objective decision-making during a potentially emotional period for both parent and child.

Another parent-child conflict concerning medical procedures has arisen in regard to abortion procural. In these cases, it is not judicial intervention which is sought but rather the personal right of a pregnant minor to consent to or to refuse an abortion.[82] Proponents of this independent right for

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78. For a discussion of the problems encountered in obtaining jurisdiction under neglect statutes, see Wilkins, *supra* note 72, at 56.

79. Ellis, *supra* note 2, at 855.

80. For example, in the context of mental illness it has been suggested that parents in recent years may have resorted to voluntary commitment in reaction to the counter cultural values and lifestyles they saw their children embracing. The parents' own visceral reactions thus motivated their decision in many instances. *Id.* at 851; Affidavit of Dr. Eli Charles Messinger, *supra* note 1, at 8. In the realm of mental retardation, societal pressures and personal feelings also interfere with parental ability to decide upon the appropriate course of conduct.

> The parent may be motivated to ask for such institutionalization for a variety of reasons other than the best interests of the child himself, i.e., the interests of other children in the family, mental and physical frustration, economic stress, hostility toward the child stemming from the added pressures of caring for him, and perceived stigma of mental retardation.

Murdock, *Civil Rights of the Mentally Retarded — Some Critical Issues, supra* note 38, at 10.

81. Wilkins, *supra* note 72, at 55.

82. Because the decision to perform an abortion is essentially a medical judgment based on the particular circumstances of each case, this discussion proceeds on the assumption that the minor is in consultation with a physician. *See* note 84 and accompanying text *infra*. The "independence" sought refers to independence from parental control of the minor's abortion decision.

minors emphasize that: "it is the minor, not the parent, who must bear the ultimate burden either of the abortion or of raising the child or placing it for adoption;"[83] and also that "Because the rationale of *Doe* and *Roe* requires the participation of the physician in the decision-making, the dangers of an uninformed decision by the minor are mitigated."[84] Analogously, it is the child, not the parent who must bear the various burdens of institutionalization.[85] However, the participation of the admitting physician at the institution does *not* adequately mitigate the dangers of an improper decision.[86] Thus it is necessary to go one step further to insure that the best interests of the minor are protected. The court in *Bartley* appropriately identified that next step as the affording of due process protections.[87] The end result in either case is preservation of the minor's liberty, but the realities of the two situations dictate different procedures. Accepting the validity of this end result, courts have recently begun to recognize the minor's independent right to consent to or to refuse an abortion. The Maryland Court of Special Appeals in *In re Smith*[88] overturned a lower court order that the minor obey her mother and submit to an abortion. The court held that a parent having the custody of a minor daughter, sixteen years old, may not compel the child, over the child's opposition, to submit herself to procedures which may lead to an abortion.[89] In *Coe v. Gerstein*[90] a three-judge federal court, although recognizing the interests of parents within the family unit, granted declaratory relief to an unmarried pregnant minor who challenged a Florida statute requiring parental consent to her abortion. Similar results have been reached in a number of other cases.[91] In addition, many state legislatures have acted to preserve

83. Note, *The Minor's Right to Abortion and the Requirement of Parental Consent, supra* note 71, at 324.

84. *Id. Doe* and *Roe,* refer to the Supreme Court decisions on abortion, Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973), in which the Court explained that the attending physician, in consultation with his patient, must bear primary responsibility for the ultimate decision and its effectuation and must decide that in his medical judgment the patient's pregnancy should be terminated. 410 U.S. at 163–64.

85. For a discussion of these burdens see text accompanying notes 54–68.

86. *See* text accompanying notes 42–53 *supra.*

87. 402 F. Supp. at 1045–47.

88. 16 Md. App. 209, 295 A.2d 238 (1972).

89. *Id.* at 223–24, 295 A.2d at 245. In so holding, the court quoted and implicitly overruled the reasoning of the lower court that "the Court can certainly support parents in doing what they think is best for the child. . . . We don't have the mother refusing the medical procedure and the daughter refusing to obey her mother's orders." *Id.* at 217–18, 295 A.2d at 242.

90. 376 F. Supp. 695 (S.D. Fla. 1973) (three-judge court) (Florida statute relating to spousal or parental consent to an abortion held unconstitutional).

91. *See, e.g.,* Foe v. Vanderhoof, 389 F. Supp. 947 (D. Col. 1975); Wolfe v. Schroering, 388 F. Supp. 631 (W.D. Ky. 1974); Washington v. Koome, 84 Wash. 2d 901, 530 P.2d 260 (1975); *In re* Diane, 318 A.2d 629 (Del. Ch. 1974). Subsequent to the completion of this Comment, the Supreme Court, in Planned Parenthood of Central Missouri v. Danforth, 44 U.S.L.W. 5197 (July 1, 1976) struck down a state

the rights of minors by allowing unmarried teenagers under eighteen years of age to consent to their own contraceptive services, abortion and treatment for veneral disease.[92] Legislatures and courts have thus begun to take the necessary steps to preserve the interests of children in appropriate medical treatment. Procedures must now be implemented to assure proper mental health care as well.[93]

Parental Tort Immunity

The doctrine of parental tort immunity[94] and the practice of voluntary admissions share a common justification — the preservation of family harmony by avoidance of adversarial proceedings.[95] Ironically, they also share the feature of operating to the child's detriment. The doctrine of parental tort immunity, strictly adhered to, denies children a valuable means of challenging their parents' conduct even in the extreme cases

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statute requiring parental consent before an abortion can be performed on a minor. The statute under review provided:

> Section 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:
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> . . . .
>
> (4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

Mo. REV. STAT. § 188.020 (1976 Supp.) The Court stated:

> [T]he State may not impose a blanket provision, such as § 3(4), requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy. . . . [T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

44 U.S.L.W. at 5203-04.

92. 3 FAMILY PLANNING DIGEST 7 (January 1975). Unmarried teenagers younger than eighteen may consent for their own contraceptive services in at least twenty-four states and the District of Columbia, and for abortion in seventeen states and the District. Minors under eighteen may consent for veneral disease treatment in all states but Wisconsin and Hawaii.

93. *See* text accompanying note 87 *supra.*

94. This doctrine prevents civil liability from being imposed between parent and child for conduct which would be a tort and result in liability if it occurred between two parties who were not in a parent-child relationship. W. PROSSER, LAW OF TORTS § 122 (1971).

95. *See* Note, *Streenz v. Streenz: The End of an Era of Parental Tort Immunity,* 13 ARIZ. L. REV. 720, 727 (1971); T. SZASZ, LAW, LIBERTY AND PSYCHIATRY 154 (1963). Other justifications for parental tort immunity include avoidance of fraud and collusion, maintenance of parental care, discipline and control over the child, prevention of depletion of family funds, and avoidance of the possibility of succession by the tortfeasor to the amount recovered in damages by the injured party. *Id.* at 727 n.52. But "by far the most frequently cited rationale for the doctrine is that to allow children to sue their parents would disturb domestic tranquility." Note, *Parental Tort Immunity Doctrine in Indiana,* 8 IND. L. REV. 394, 405 (1974).

where a child has been beaten or raped by a parent.[96] Voluntary admissions, in addition to denying children a valuable means of challenging their parents' conduct, forces children, who are not in need of treatment, to be institutionalized against their will and deprived of their freedom.[97] Recognizing that the family harmony rationale supported an injustice in perpetuating parental tort immunity, the courts began to reevaluate it.[98] The result has been the abrogation of the doctrine in a number of states.[99] The criticisms directed at the family harmony rationale in the context of parental tort immunity provide useful insight into the appropriateness of continuing its use as a justification for voluntary admissions. The family harmony argument was first attacked for its apparent inconsistent application. The risk of disturbing domestic tranquility, if indeed there is such a risk, is also present in property and contract actions yet the law does not always bar these confrontations.[100] Secondly, the circumstances of the case may themselves indicate that there was no family harmony at the outset; thus there is nothing to preserve.[101] Finally, the most persuasive argument is that the denial of a remedy for the child may very well result in the precise evil sought to be avoided. "If a child is injured and angry enough to sue his parent, denying the child a legal remedy will neither soothe the child nor promote harmony in the family."[102]

Analyzing the family harmony rationale in the context of "voluntary" admissions, the same inconsistency, dubiousness and likelihood of reverse effect is apparent. The courts have involved themselves in a number of situations where the interests of parent and child conflict.[103] It is disingenous to suggest that allowing a child to contest his need for institutionalization will more severely affect family harmony than these other proceedings. The chances that family harmony never really existed are

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96. *See, e.g.,* Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905) (held that daughter could not sue her father for damages arising out of a rape); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903) (held that a minor child could not sue her stepmother or father for damages resulting from brutal punishment inflicted by the stepmother with the father's consent).

97. For a discussion of reasons for commitment other than the child's need for treatment, see text accompanying notes 33–41 *supra.*

98. *See* Comment, *IntraFamily Tort Liability — A Situation of Confused Disparity,* 5 CUMBER. SAM. L. REV. 273, 296 n.167 (1974–75).

99. Note, *Streenz v. Streenz: The End of an Era of Parental Tort Immunity, supra* note 95, at 722.

100. *See* Gibson v. Gibson, 3 Cal. 3d 914, 92 Cal. Rptr. 288, 479 P.2d 648 (1971); Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); Hebel v. Hebel, 435 P.2d 9 (Alas. 1967).

101. *See* Note, *Parental Tort Immunity Doctrine in Indiana, supra* note 95, at 405.

102. Note, *Streenz v. Streenz: The End of an Era of Parental Tort Immunity, supra* note 95, at 728.

103. *See* note 69 and accompanying text *supra.*

even greater in this context than in a tort case. "Often the problems which lead parents to seek hospitalization of their child can be traced to family difficulties and not just the 'illness' of an individual child."[104] Denying the child a right to be heard in commitment proceedings will most probably result in the child's institutionalization, but there is unlikely to be any lasting peace in the family. "Judicial nonintervention supports the integrity of the family unit only in the sense that it allows the parents in a dysfunctional family to deny the existence of real family problems by 'blaming' them on the illness of one of their children."[105] Thus, rather than achieving any sort of meaningful family harmony, "voluntary" admission procedures merely allow the family to turn its back on the problem. The law should not seek to encourage such artificial domestic tranquility. Preservation of family harmony is as inappropriate a justification for "voluntary" admission as it is for the parental tort immunity doctrine, for the simple reason that family harmony is unlikely to be preserved or achieved by either practice. However, encouraging domestic tranquility is a very worthy objective and should not be abandoned because the means sought were ineffectual. In fact, this objective has been furthered by the *Bartley* court in that the procedures it outlined[106] contribute substantially to family understanding and harmony in addition to protecting the interests of the child.[107]

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104. Ellis, *supra* note 2, at 859 *citing* T. LIDZ, S. FLECK & A. CORNELLISON, SCHIZOPHRENIA AND THE FAMILY (1965).

105. *Id.* at 854–55.

106. 402 F. Supp. at 1048–54.

107. Dr. Eli Charles Messinger points out several ways in which the family would benefit from the provision of due process protections for the child. All parties would have an opportunity to air their differences in an open and forthright manner.

> Rather than masking family disputes and difficulties, they would be recognized so they could be dealt with more constructively. Emphasis would be placed on developing a comprehensive picture of the events that have led parents to seek institutionalization of the juvenile. This effort at fact finding in itself would have a therapeutic effect on the child and family; for some it would be the first time that they will have been exposed to all sides of the story.

Affidavit of Dr. Eli Charles Messinger, *supra* note 1, at 14. In addition, more emphasis would be placed on alternatives to hospitalization.

> Mental health professionals would be under self-imposed pressure to find such alternatives rather than have to defend questionable hospitalization recommendations. The juvenile's attorney would also have an opportunity to add his or her resources and talents to the search. In some cases, the necessity for a hearing would be avoided because satisfactory alternatives to hospitalization would have been secured. Rather than discouraging people from seeking treatment for juveniles, *services would be provided that were better fitted to the child's and family's needs.*

Id. at 13 (emphasis added).

Child Abuse and Neglect

Probably the most obvious examples of conflicts of interest between parent and child are cases of child abuse[108] and neglect.[109] In these areas the state readily intervenes on behalf of the child.[110] The abuse[111] problem is relevant to the "voluntary" admissions issue for several reasons. It is a stark reminder that parents on some occasions do not act in the best interests of their children.[112] In addition, the state's resolution of the parent-child conflict reflected by such abuse provides a basis for evaluating the means chosen by the court in *Bartley* for resolving the conflict associated with "voluntary" admissions.[113]

When abuse is detected,[114] the state initiates a judicial proceeding[115] to resolve the conflict between the rights of the parents[116] and the rights of

108. Child abuse has historically been defined as any non-accidental injury inflicted on the child by the parent. Over the years, various statutory refinements have been made. Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse,* 12 AM. CRIM. L. REV. 103, 106 (1974).

109. Statutes defining neglect encompass a variety of situations including lack of parental care, failure to provide for a child's needs, unfit environment, etc. *See* S. KATZ, WHEN PARENTS FAIL 57–58 (1971). Some states have recently begun to include neglect in their definition of child abuse. *See* Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse, supra* note 108, at 106–08.

110. *See* V. DEFRANCIS & C. LUCHT, CHILD ABUSE LEGISLATION IN THE 1970'S (rev. ed. 1974).

111. For the purpose of the Child Abuse and Neglect section of this Comment, the term "abuse" will be used to refer to both classes of cases.

112. Judge Huyett commented on this fact in his opinion in *Bartley. See* note 23 *supra.*

113. Because the effectiveness of state intervention in the abuse area has recently been subjected to a great deal of criticism, *see, e.g.,* Wald, *State Intervention on Behalf of "Neglected" Children, A Search for Realistic Standards,* 27 STAN. L. REV. 985 (1975); Clements, *Child Abuse: The Problem of Definition,* 8 CREIGHTON L. REV. 729 (1974–75); Duncan, *Recognition and Protection of the Family's Interests in Child Abuse Proceedings,* 13 FAM. L.J. 83 (1973–74), both present procedures and suggestions for revision will be considered.

114. Mandatory reporting statutes have been enacted in all states to facilitate the bringing of information concerning alleged cruelty to the state's attention. *See* Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse, supra* note 108, at 108–16, which delineates who is required to report suspected cases of child abuse pursuant to the various state statutes. For example, in all states physicians are required to report suspected cases of child abuse, in a majority of states the requirement is extended to nurses, and in some states social workers, teachers, police officers or any other person who has reasonable cause to suspect that abuse has occurred are included within the statutory mandate. The state reporting laws are compiled in V. DEFRANCIS & C. LUCHT, CHILD ABUSE LEGISLATION IN THE 1970'S (rev. ed. 1974). For a discussion of possible negative ramifications of reporting statutes, see Kleinfeld, *Balance of Power Among Infants, Their Parents and the State, Part II,* 4 FAM. L.Q. 410, 431–32 (1970–71).

115. The proceedings, however, are conducted loosely and without minimum due process standards. *See generally* Note, *Dependent-Neglect Proceedings: A Case for Procedural Due Process,* 9 DUQUESNE L. REV. 651 (1971).

116. Parental rights applicable to this discussion include the right to raise a family and direct its upbringing. *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972); Prince

the child.[117] The state, as complainant, must prove by a preponderance of the evidence[118] that the parents have subjected the child to abuse. Once this is established, there are a number of remedies from which the court may choose.[119] For example, the court may order the removal of the child from the custody of his parents,[120] require the parents to accept compulsory supervisory services,[121] or order the child placed in a day care program.[122] There is unlimited potential for judicial creativity in shaping a remedy designed to promote the best interests of the child; however, restrictions on court time frequently dictate that it forego a creative role in the handling of children.[123] In essence, the state is interjecting third party assistance in cases where parents have failed to meet the minimum standards of acceptable parental behavior.[124] The courts are intent upon protecting the best interests of the child, because it is the child who suffers by virtue of the parental inadequacy. There is a place for this same concern in the realm of admissions to mental hospitals. The fact that inappropriate parental conduct in this context may be inadvertent

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v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

117. The child's rights include the right to life, adequate care, and freedom from cruel or unusual punishment. *See* V. DEFRANCIS, TERMINATION OF PARENTAL RIGHTS 8–10 (1971). In addition, it has been suggested that the right of parents to bring up children may imply a correlative right of children to be raised by their parents. *See* Weiss, *The Emerging Rights of Minors,* 4 U. TOL. L. REV. 25, 28–29 (1972).

118. Some jurisdictions require the state to prove its case by clear and convincing evidence. *See, e.g., In re* Overton, 316 N.E.2d 201 (Ill. Ct. App. 1974); Hendrickson v. Binkley, 316 N.E.2d 376 (Ind. Ct. App. 1974).

119. *See* Katz, *supra* note 109, at 81.

120. *See* Carpenter, *The Parent-Child Dilemma in the Courts,* 30 OHIO ST. L.J. 292 (1969).

121. *See generally* Wyman v. James, 400 U.S. 309 (1971) (Court upheld New York state's requirement that welfare mother permit a home visit by welfare worker); Dembitz, *Welfare Home Visits: Child Versus Parent,* 57 A.B.A.J. 871 (1971).

122. *See* 3 S. WHITE, FEDERAL PROGRAMS FOR YOUNG CHILDREN: REVIEW AND RECOMMENDATIONS 31–43 (1973); Pavenstedt, *An Intervention Program for Infants from High Risk Homes,* 63 AM. J. PUB. HEALTH 393 (1973).

123. Note, *Neglected Children and Their Parents in Indiana,* 7 IND. L. REV. 1049, 1051 (1974).

124. Courts are careful in this regard not to impose arbitrary notions of proper parenting. *See, e.g.,* State v. McMaster, 259 Ore. 291, 486 P.2d 567, 572–73 (1971), in which the court stated:

> [W]e do not believe the legislature contemplated that parental rights could be terminated because the natural parents are unable to furnish surroundings which could enable the child to grow up as we would desire all children to do. . . . The legislature had in mind conduct substantially departing from the norm. . . .

Accord, In re Raya, 63 Cal. Rptr. 252, 255 (Ct. App. 1967).

rather than intentional should not be significant.[125] The child's interests are equally in need of protection where institutionalization is contemplated as where abuse or neglect is inflicted.[126] The procedures outlined in *Bartley* to insure such protection constitute a significantly lesser intrusion into family affairs than that required in abuse cases.[127] The limited nature and purpose of state intervention imposed by the *Bartley* decision is in line with the revisions sought by critics of the present child abuse jurisdiction of the courts. One of the most frequent complaints concerns the lack of due process requirements.[128] Another is the broad and vague language of the statutes which seem to allow virtually unlimited intervention.[129] In addition, the remedy of removing the child from the family has been sharply criticized as an ineffectual way of resolving the problem.

> It is well recognized by psychiatrists that so far as the child's emotions are concerned, interference with [parental] tie[s], whether to a 'fit' or 'unfit' psychological parent is extremely painful. Continuity of relationships is extremely important to children. Removing a child from his family may cause serious psychological damage — damage more serious than the harm intervention is supposed to prevent.[130]

On the contrary, in the judicial proceedings advocated in the context of institutionalization, the court-enforced protections avert unnecessary separations of the child from his family while encouraging attempts to find more appropriate, less drastic solutions.

Thus, in taking jurisdiction of neglect and child abuse cases, the courts very definitely and justifiably have involved themselves in family affairs. This involvement can and should be extended to encompass admission of children to mental institutions. Affording due process protections to children will prevent needless commitments with their attendant family disruptions. Such limited intervention is well within the bounds of proper state involvement even when judged by the standards of the critics of child abuse and neglect jurisdiction.

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125. As Judge Fuld stated in his dissenting opinion in *In re* Seiferth, 309 N.Y. 80, 86, 127 N.E.2d 820, 824 (1955): "To the boy and his future, it makes no difference that it may be ignorance rather than viciousness that will perpetuate his unfortunate condition." (That case concerned a proceeding to transfer custody of a fourteen year old boy from his parents to Commissioner of Social Welfare for purposes of consenting to performance of medical services which his parents had refused).

126. For a discussion of the appalling conditions and treatment likely to be encountered by people in mental institutions see Ferleger, *Loosing the Chains: In-Hospital Civil Liberties of Mental Patients,* 13 SANTA CLARA LAW. 447 (1973).

127. What is involved in a commitment hearing is not an after-the-fact review of parental conduct but rather an evaluation of the child's mental state.

128. *See, e.g.,* Note, *Dependent-Neglect Proceedings: A Case for Procedural Due Process, supra* note 115; Duncan, *Recognition and Protection of the Family's Interests in Child Abuse Proceedings, supra* note 113, at 809.

129. Wald, *State Intervention on Behalf of "Neglected" Children, A Search for Realistic Standards, supra* note 113, at 1000.

130. *Id.* at 993–94 (footnotes omitted). *But see* Kleinfeld, *Balance of Power Among Infants, Their Parents and the State, Part II, supra* note 114, at 432–33.

Ungovernability

The parent-child conflict, ignored in the realm of "voluntary" admissions, is virtually conceded when parents seek to have their child adjudged ungovernable.[131] Parents who consider themselves unable to govern their child's behavior may invoke the jurisdiction of juvenile and family courts over youths who have engaged in non-criminal behavior.[132] The court then has the authority to place the child in a "reform" or "training" school, if in fact such action is deemed necessary.[133] Parents who believe their children are beyond control *cannot* "volunteer" them to training schools.[134]

At one time, however, courts were unwilling to recognize the parent-child conflict and sanctioned procedures for admitting a child to reform school which closely parallel those used today for "voluntary" admissions to mental hospitals. An example of this judicial attitude is evidenced in the case of *Rule v. Geddes*.[135] The court in that case upheld the commitment of a fifteen year old girl to reform school for incorrigibility despite the fact that she had been committed upon the application of her father without notice or an opportunity for a hearing. The court stated:

> The petitioner was a minor. . . . Her father, as her natural guardian, had the legal right to regulate her conduct, to restrain her liberty within all reasonable bounds, and to direct her training and education. She was not entitled to general freedom of action, but was under his tutelage. He had the legal right to confine her within certain limits, to select her associates, and to commit her to the restraint of an institution for training and education during her minority without her consent. Her reasonable detention during such period for purposes of education would not be imprisonment, but the lawful restraint implied in the exercise of recognized parental authority. . . .
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> . . . The child herself, having no right to control her own action or to select her own course of life, had no legal right to be heard in these proceedings.[136]

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131. Where the parent is the complainant against an allegedly disobedient child, the conflict of interests is apparent and has been recognized as such by the courts. *See, e.g.,* Marsden v. Commonwealth, 352 Mass. 564, 227 N.E.2d 1 (1967) (child must be provided with separate counsel); *In re* Sippy, 97 A.2d 455 (D.C. Mun. Ct. App. 1953) (mother cannot control daughter's legal representation or waive doctor-patient privilege for her in "beyond control" proceedings).

132. Note, *Ungovernability: The Unjustifiable Jurisdiction,* 83 YALE L.J. 1383 (1974). Offenses include such things as staying out late, disobeying parents, running away, and truancy. This jurisdiction is commonly referred to as "ungovernability" or "beyond control" or "in-need-of-supervision" jurisdiction. Unrelated individuals, police, and various institutions also initiate ungovernability proceedings.

133. *See* Klapmuts, *Children's Rights: The Legal Rights of Minors in Conflict with Law or Social Custom,* 4 CRIME & DELIN. LIT. 449 (1972).

134. The Supreme Court has established stringent due process procedures for the incarceration of children, whether for criminal behavior or for mere disobedience or incorrigibility. *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (details the development of due process protections in juvenile courts).

135. 23 App. D.C. 31 (Ct. App. 1904).

136. *Id.* at 49–50.

The analogue between reform schools and mental hospitals did not end when the former underwent the judicially enforced change in admissions procedures. In the eyes of many parents who can no longer control their child's behavior, a reform school and a mental hospital may appear fungible.[137] If they are reluctant to refer the child to local authorities under the "beyond control" statutes[138] (and thereby subject the child and themselves to juvenile court proceedings), they are likely to resort to "voluntary" placement of the child in a mental hospital.[139] Both institutions are designed to perform treatment, not punishment. However, the facilities of both are often dangerous and deteriorated.[140] And, the child, in either situation, must suffer a grievous loss of liberty.[141]

In light of these similarities, it seems incongruous to ignore the conflict of interests and potential for incarceration in voluntary admissions and deny due process protection to the child. The court in *Bartley* alluded to this when it quoted the following statement of the Tenth Circuit in *Heryford v. Parker*:[142]

> It matters not whether the proceedings be labeled 'civil' or 'criminal' or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration — whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble minded or mental incompetent — which commands observance of the constitutional safeguards of due process.

Because the parent-child conflict and the threat of involuntary incarceration are just as real for a child facing institutionalization as they are for a child

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137. This is most likely to occur in situations where the parents do not have the requisite wealth to seek private treatment and are thus dependent upon public institutions.

138. *See, e.g.*, MD. CTS. & JUD. PRO. CODE ANN. § 3-801 (1974) (child in need of supervision).

139. This occurrence is reflected in a number of the reasons for plaintiffs' commitments cited by the court in *Bartley, e.g.*, difficulties in relating to mother, poor family situations, management problem to parents and community, running away, truance, school phobia, and drug overdose. 402 F. Supp. at 1044.

140. *See* Note, *Ungovernability: The Unjustifiable Jurisdiction, supra* note 131, at 1047 (discussing detention centers for ungovernable youths); Ferleger, *Loosing the Chains: In-Hospital Civil Liberties of Mental Patients, supra* note 126 (discussing conditions in mental hospitals).

141. *See In re* Gault, 387 U.S. 1, 27-28 (1966). "The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence and of limited practical meaning that the institution to which he is committed is called an industrial school."

142. 402 F. Supp. at 1046, *quoting from* Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968). *Heryford* was a habeas corpus proceeding brought by a mother as natural guardian on behalf of her mentally deficient son who had been committed to a state training school for the feeble-minded and epileptic. The court held that a denial of due process occurred where a mentally deficient person was not afforded legal counsel at the hearing which resulted in his involuntary commitment to a state institution.

charged with ungovernability, the same procedural protections should apply. The court in *Bartley* thus appropriately remedied the existing disparity.[143]

THE IMPACT OF THE CONFLICT BETWEEN PARENT AND STATE

While the Supreme Court has addressed the issue of parental authority on a number of occasions,[144] it has in the past concentrated on the conflict between the authority of the parent and the power of the state,[145] clearly a different issue than the parent-child conflict presented by *Bartley*. The Court's position, developed in this context of parent versus state was aptly summarized in *Stanley v. Illinois*:[146]

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, . . . "basic civil rights of man," *Skinner v. Oklahoma*, . . . and "[r]ights far more precious than property rights," *May v. Anderson*. . . . It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. *Prince v. Massachusetts*. . . . The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska*, . . . the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma*, . . . and the Ninth Amendment, *Griswold v. Connecticut*. . . .

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143. It is important to note that affording due process is not a panacea in and of itself. Despite the procedural protection guaranteed in ungovernability proceedings, the system is still subjected to a great deal of abuse and the parent-child conflict is not always appropriately resolved. *See* Sidman, *The Massachusetts Stubborn Child Law: Law and Order in the Home*, 6 FAM. L.Q. 33 (1972). Note, *Ungovernability: The Unjustifiable Jurisdiction*, *supra* note 132.

144. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

145. In Meyer v. Nebraska, 262 U.S. 390 (1923), for example, a conflict existed between a state prohibition of the teaching of any language other than English in the first eight grades of school and the parental desire to have their children learn German. The Court found in favor of the parents, holding the applicable state statute to be in violation of the fourteenth amendment. In Pierce v. Society of Sisters, 268 U.S. 510 (1925), the conflict involved a state requirement that children between the ages of eight and sixteen attend public school and the desire on the part of some parents to send their children to private schools. Again the Court preserved the authority of parents to direct their child's education as opposed to allowing the state to do so. In Prince v. Massachusetts, 321 U.S. 158 (1944), the Court limited parental authority somewhat by convicting the guardian of a nine year old child for violating state labor laws by furnishing the child with magazines knowing that the child would sell them unlawfully. The Court noted that the family is not totally beyond the control of the state and that the state may restrict the parent's control by requiring school attendance and regulating or prohibiting the child's labor. 321 U.S. at 166.

146. 405 U.S. 645, 651 (1972) (citations omitted) (unwed father entitled to a hearing on his fitness as a parent before his children are taken from him upon mother's death).

Because the Court assumed the parents' interest and the child's interests were compatible, the line of authority reflected in the above statement is only relevant to, *not* determinative of, the issue at hand. The Court acknowledged this fact in *Wisconsin v. Yoder*[147] where, in reviewing the conviction of Old Order Amishmen for violation of Wisconsin's compulsory school attendance law, it held that the first and fourteenth amendments prevent the state from compelling the Amish to send their children to formal high school until age sixteen. The Court stated: "Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary."[148] Lower courts have also evinced an awareness of the differences between the two issues. Referring to the *Pierce, Meyer, Prince* line of authority, one court stated:

> [T]hose cases which have considered parental control of children have involved conflicts between parents and the state wherein the courts have considered intrusions by the state into the area of parental values. . . . Cases which have upheld parental control have not involved a situation where the parent and child differ and the state is imposing the parents' views on the minor.[149]

Certainly, the authority of parents as the persons best suited and primarily responsible for the raising of their children[150] is not herein disputed. What is emphasized is that parental authority is not unlimited

147. 406 U.S. 205 (1972).

148. *Id.* at 231. Justice Douglas in dissent, however, refused to assume an identity of interest between parent and child, and urged resolution of the parent-child conflict. He noted, "[W]e have in the past analyzed similar conflicts between parent and State with little regard for the views of the child." *Id.* at 243. Douglas argued that on the important and vital matter of education, the child was entitled to be heard. "If he [the child] is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed." *Id.* at 245–46.

149. Foe v. Vanderhoof, 389 F. Supp. 947, 956 (D. Col. 1975) (child's right to have an abortion may not be conditioned upon parental approval). Another court stated:

> [T]he cases cited by defendants and intervenors involving rights of parents uniformly concern situations where the parents' claimed rights are compatible with the minor's, not adverse. Such cases are of no assistance. Of course parents have rights in proper instances, to act in their children's interests. What is claimed here is something altogether different. But even if it should be found that parents may have rights that are separate from the child's, we would find that in the present area the individual rights of the minor outweigh the rights of the parents, and must be protected.

Baird v. Bellotti, 393 F. Supp. 847, 856–57 (D. Mass. 1975), *prob. juris. noted,* 96 S. Ct. 390 (1976) (child's right to an abortion without parental consent).

150. *See* Bazelon, *Whose Needy Children?,* 8 U. MICH. J.L. REF. 237, 246 (1975):

> [T]he family is the most effective child-developing agent around, when it wants to be and can be. Out of the plethora of studies of day care and early intervention, one thing stands out: a child needs most a family — it is there that he finds his roots and his education.

and at some point in time must be balanced against other interests.[151] In the context of "voluntary" admissions, the balance must be struck between the interests of the parent and those of the child; therefore the cases upholding the traditional authority of parents against the encroachments of the state are not controlling.[152] The conflict is clearly intra-family and must be resolved as such.

CONCLUSION

Children have a constitutionally protected interest in being free from wrongful and unwarranted deprivations of liberty. Unnecessary confinement and detention in a mental institution is a deprivation of liberty. Thus a child facing institutionalization must be afforded the procedural protection guaranteed by the due process clause of the fourteenth amendment. However, the application of due process, to be meaningful in this context, must be accompanied by an assurance that parents will not be allowed to waive the constitutional rights of the child. The need for this assurance derives from the fact that the interests of parents and children in the matter of institutionalization are not necessarily the same. In other areas where parent and child interests conflict, the courts and legislatures have provided means of reconciliation. The court in *Bartley* properly concluded that the application of due process would provide the necessary balance between the rights of parents and children in the particular area of conflict under review. This decision in no way denigrates the importance of the family; rather it encourages families to settle their problems in an open and equitable fashion. The court's respect for the family is evidenced in its statement that:

> This finding does not mean that when considering whether or not to institutionalize a child, the state should ignore the opinions and observations of the child's parents. Rather the committing authorities should listen carefully to parents who live with and observe the child on a daily basis for they very likely have invaluable information concerning their child.[153]

In light of the seriousness and potential danger of juvenile institutionalization in mental hospitals, due process of law, as a check on unbridled parental discretion, is essential and will ultimately inure to the benefit of both parent and child.

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151. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

152. The primary state interest here is in ensuring the appropriateness of state hospital confinement.

153. 402 F. Supp. at 1048 n.12.